

# Memory Wars of Commercial Worth – The Legal Status of the Red Star in Hungary

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Marina Bán Do 11 Jan 2018

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In March 2017, the Hungarian government introduced a proposition to expand the prohibition on the public display of totalitarian symbols. The public use of five symbols – the swastika, the SS runes, the Arrow Cross, the hammer and the sickle and the five-pointed red star – has been illegal in Hungary since 1993, with the exception of displays for artistic, scientific or educational reasons. The current proposal adds the prohibition on using these symbols for ‘commercial gain’. The proposal is supposed to aim at preventing the normalization of these symbols, as citizens may see them daily on commercial brands, and thus guarding Hungary’s ‘public order and public morals’. Even though no business presents swastikas or other Nazi symbols on their logos, quite a few of them feature the red star, including companies such as Heineken, Converse, Milky Way and San Pellegrino.

## Memory Laws for Commercial Wars?

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This proposition is significant as it shows the extent to which the Hungarian state is willing to interfere in transnational business affairs in defense of national historical memory. The proposition presents serious complications to one of the fundamental freedoms of the European single market – the free movement of goods. Although the provision is not in force yet, if it ever makes it through parliament, its implementation will be problematic at best. Not only would several successful brands find it difficult to sell their products in Hungarian stores but what happens, for example, when the average Hungarian citizen watches a UEFA Champions League game on television? They will immediately be confronted with Heineken’s red star as the Dutch brewer is one of the main sponsors of the League. Would the Hungarian television channels be obliged to keep an eye out for such eventualities and censor them? Or allow broadcasting but provide a detailed historical explanation for the viewers? The ubiquity of internet and television makes it impossible to completely shield people in Hungary from seeing the red star from time to time.

In addition, the principle of mutual recognition within the internal market requires Hungary to allow the distribution of any product that can lawfully be sold or marketed in other EU Member States. In this respect, the Hungarian prohibition would permit exemptions granted by the government if the requesting company can prove that (1) its particular interest in using the prohibited symbol would be severely and disproportionately harmed, and (2) this interest does not offend the sensitivities of victim groups associated with the historical use of the symbol in question. These conditions could serve as a loophole to ensure respect for free movement and mutual recognition. However, the proposition further specifies that requests would be examined on a case-by-case basis and the mere existence of symbols as part of well-established copyrighted company logos would not qualify for an automatic exemption. Thus, it is impossible to predict which companies would be exempt and able to continue to operate in Hungary under this proposal.

Surprisingly, after the Hungarian government referred the proposition to the European Commission, the Commission greenlighted the prohibition, nonetheless specifying that it should not allow for discrimination against any specific company or product within the internal market. A spokesperson for the Commissioner for Internal Market has justified the permission of the Commission by citing the ‘special historical context and circumstances in Hungary’ concerning the legacy of the country’s previous communism regime. Nevertheless, such a prohibition would pose a significant threat to the freedom of Heineken and other companies to conduct their business within the European Union.

Therefore the question arises whether it is worth introducing this provision at all, given the complications its implementation will definitely involve. Is the current ban on displaying the red star not sufficient? Notably, it already inspires a significant amount of tension between the Hungarian government and the European Court of Human Rights. The ECtHR has consistently proclaimed any prohibition on communist symbols to be an unnecessary interference with the right to freedom of expression (in the cases of Vajnai v. Hungary in 2008 and Fratanoló v. Hungary in 2011), a view shared by the Hungarian Constitutional Court since 2013 (Decision 4/2013). However, not only has Hungary refused to retract the original provision, this new law is currently in the works as well.

## Why now?

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The situation presents further complications with regards to the motivations behind the proposition. During the parliamentary debate, representatives of the opposition accused the government of only using it to put pressure on Heineken. In fact, the Hungarian media has taken to referring to the proposal as ‘Lex Heineken’. The brewer has been involved in a legal battle over copyright issues with Igazi Csíki Sör, a Hungarian brewer in Transylvania (Romania). Recently, the government has indeed strengthened its position on the defense of Hungarian culture across the borders, especially in territories such as Transylvania that had belonged to Hungary before the Treaty of Trianon was signed in 1920. Nevertheless, even after an agreement was reached between Heineken and Igazi Csíki Sör, the extended prohibition of the red star is still on the table.

In light of these developments, the striking fixation on the role of the red star could point to deeper changes in Hungarian memory politics. Since 2010, the main themes of Hungarian historical memory have been almost completely refocused in the public sphere. This includes the transformation of the official viewpoint on the legacy of the communist regime. During Hungary’s transition from communism to democracy between 1990 and 2010, the memory of the communist regime was treated with cautious condemnation. Due to the peaceful nature of the transition, prosecutions of communist leaders were few and far between, and the 1993 ban on totalitarian symbols was the only criminal measure to concern communism. Instead, the condemnation of the communist regime mostly manifested in the increased commemoration of the 1956 Revolution. However, since 2010, the denunciation of communism has been reaching new heights. Firstly, it features heavily as a statement in the National Avowal of the Hungarian Fundamental Law. Secondly, another criminal prohibition was introduced in 2010, threatening up to three years of imprisonment for anyone who denies, questions or minimizes the ‘genocide and other

crimes against humanity committed by the communist regime'. Thirdly, the Fundamental Law also allowed the Committee of National Memory to be founded, which is tasked with investigating the aforementioned crimes.

Unfortunately, the transformation of memory politics has been simultaneous to Hungary's descent into illiberal democracy. That is not to say that efforts to finally come to terms with the totalitarian past and to evaluate the legacy of such regimes are not completely justified. In other parts of Europe, the memory of communism is also treated in a surprisingly lax way. This may be linked to the fact that half of the continent did not experience communism on the state level. However, since the early 2000s, the EU has consistently called for communist crimes to be condemned in the same manner as Nazi crimes; notably, this viewpoint is not shared by the ECtHR.

Specifically in Hungary, the two decades after the fall of the communism certainly did not result in a complete and critical assessment of the regime, at least not on the political level. In the Hungarian context, confronting the totalitarian past since 2010 has been quite one-sided, ignoring opinions from both the Hungarian Constitutional Court and the ECtHR. The efforts of coming to terms with the past have become a tool in the consolidation of the post-2010 regime. Anti-communism is used as a significant factor in the identity construction of the current government, in contrast to the pre-2010 socialist-led governments.

The extension of the ban on totalitarian symbols could be seen as a further sign of this development. The proposition has been allowed to proceed as of September 2017, however it has not been passed yet. At this point, the Hungarian government can either decide to put it back on the agenda or drop the proposal altogether. Thus, the fate of this prohibition could be a significant signal of future developments in Hungarian memory politics as well as the possible lengths the government might go to in ignoring both domestic and regional judicial decisions on fundamental rights and constitutional issues. In his seminal blogpost for this online symposium, Ulad Belavusau demonstrated how memory laws affect minorities. With this Hungarian example, I suggest that the legal governance of memory in illiberal states is not only problematic with regard to freedom of speech and non-discrimination, but can be equally detrimental to commercial freedoms and ultimately affect the internal market of the European Union.

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